BHP (USA) Inc. d/b/a BHP Coal New Mexico *and* International Union of Operating Engineers, Local 953, AFL–CIO. Cases 28–CA–17103 and 28–CA–17364

June 10, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On June 12, 2002, Administrative Law Judge James L. Rose issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this decision, and to adopt the recommended Order as modified.

The judge found, and we agree, that the Respondent violated Section 8(a)(5) by unilaterally implementing changes to its attendance policy.[2] The judge also found that the Respondent violated Section 8(a)(5) by discharging Truby Werito pursuant to the unlawfully implemented policy. We disagree and find that the General Counsel failed to meet his burden of showing by a preponderance of the evidence that the discharge was pursuant to the amended attendance policy.

It is uncontested that for many years the Respondent maintained a rule prohibiting unexcused tardiness and disciplined employees for this offense. Specifically, the Respondent's longstanding "General Rules of Conduct" provided for disciplinary action, including possible termination, for various types of misconduct. Included was a rule that prohibited "unexcused/unreported absences or tardiness (See Attendance Policy)." While the rule itself referred to unexcused tardiness, the 1995 version of the referenced attendance policy accompanying the general rules did not refer to tardiness as distinct from absenteeism. The Respondent's human resources manager, James Mik, testified that the Respondent treated tardiness the same as absenteeism under the attendance policy. However, there had been inconsistent enforcement of the attendance policy by supervisors for tardiness infractions. This inconsistency led to an arbitration award (the Sloan award of 1999) that was adverse to the Respondent. Therefore, in order to ensure consistent enforcement, the Respondent revised the 1995 attendance policy in November 2000 by setting forth a specific disciplinary scheme for unexcused tardiness. The Respondent provided the amended policy to the Union on February 13, 2001,[3] and according to Mik, implemented the policy sometime thereafter when the Respondent had completed disseminating the policy to its work force.

Prior to his termination on February 13, Werito had been tardy on September 17, 2000, December 10, 2000, and January 26, 2001. He then had an unexcused absence on January 27 for which the Respondent suspended him. Due to his poor attendance record, the Respondent issued Werito a final warning letter dated January 29, advising him that a further unexcused absence or tardy would result in termination. Despite this final warning, Werito was tardy yet again on February 9. As a result, the Respondent treated him as out of service and terminated his employment on February 13.

As argued by the Respondent, Werito's termination was preordained by the January 29 final warning letter. There is no contention in this case that the final warning letter was issued pursuant to the amended policy or was unlawful in any way. Indeed Mik provided unrefuted testimony that the Respondent did not implement its amended policy until sometime after February 13. Thus, the final warning letter was issued weeks before the Respondent implemented its amended policy. Moreover, the final warning letter contained a notice of suspension,

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Respondent excepted to the judge's finding on the basis, inter alia, that the Union waived its right to bargain by virtue of the management rights clause contained in the parties' collective-bargaining agreement, which reads: "The Company reserves all rights and powers of management except as specifically modified in this agreement or any supplementary Agreement which may hereafter be made." The judge applied the Board's "clear and unmistakable" waiver standard and found that this broad management-rights clause did not constitute a waiver of the Union's right to bargain over changes to attendance rules. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *Johnson-Bateman Co.*, 295 NLRB 180 (1989). The Respondent argues that the judge erred in applying this standard and that the Board should apply the "contract coverage" analysis announced by the D.C. Circuit in *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993). In that case, the court found appropriate a "contract coverage" analysis, rather than a clear and unmistakable analysis, where the contract covers the issue in dispute. Chairman Battista and Member Schaumber find that the result in this case would be the same under either standard.

[3] All dates hereinafter are 2001 unless otherwise indicated.

which is not an enumerated disciplinary action in the amended policy. This is additional strong evidence that the Respondent did not issue the final warning pursuant to the amended policy. Furthermore, there is no record evidence that the Respondent has failed to discharge an employee where that employee committed a further offense following the receipt of a final warning. By discharging Werito, the Respondent merely followed through on its final warning levied weeks before its implementation of the amended policy.[4]

Because we find that the General Counsel has failed to establish that the Respondent discharged Werito under the amended policy, unlike our dissenting colleague, we find it unnecessary to decide under what other policy, if any at all, the Respondent's disciplinary action was taken. As noted above, the Respondent suspended Werito and issued him a final warning for tardiness. Then, when Werito was again tardy, the Respondent discharged him pursuant to that final warning. Since neither the 1995 attendance policy nor the new amended policy provides for either a suspension or a final warning, the Respondent was applying neither policy when it discharged Werito. Accordingly, we find that the General Counsel failed to prove that the Respondent discharged Werito pursuant to the amended policy and we, therefore, dismiss the allegation that Werito's discharge violated Section 8(a)(5).

Our dissenting colleague, in finding that the Respondent applied the amended policy in discharging Werito, principally relies on an inference drawn from two facts: (1) that Werito's tardiness record would not have triggered discharge under the Respondent's 1995 attendance policy; and (2) that Werito's tardiness record would have triggered discharge under the Respondent's amended policy. He infers from these facts that the Respondent must have been applying the amended policy when the Respondent discharged Werito. We disagree. In making this contention, the dissent assumes that there were only two regimens, viz. the 1995 attendance policy and the amended policy. In truth, there was a substantial period (covering the Werito conduct and his discharge) when the 1995 attendance policy was not consistently enforced against tardiness violations and the amended policy had not come into existence.

Our colleague notes that the new policy was sent for printing in November 2000. However, he concedes that the new policy was not disseminated to the Union and to the employees until February 13, 2001. In our view, it was both reasonable and equitable to treat that policy as not being in effect until February 13. Accordingly, Werito was subject to the practice in effect prior to February 13. As discussed above, and as found by the arbitrator, that practice was not in strict conformity with the 1995 policy. It was that practice to which Werito was subjected.

Our colleague also contends that Werito's discharge would have been overturned at arbitration as contrary to the Sloan arbitration award unless the Respondent was applying its amended policy when it discharged Werito and that therefore the Respondent must have been applying its amended policy when it discharged Werito. We disagree with this reasoning. In this regard, we note that the tardiness that gave rise to the Werito discharge occurred on February 9. This was before the Respondent announced its amended policy on February 13. Thus, the Respondent could not have applied the amended policy. Further, it does not necessarily follow that such a discharge would meet the same arbitral fate as the Sloan case. Arbitrators have considerable discretion to fashion equitable awards. Indeed, in the Sloan case, the award was reinstatement and no back pay. It is sheer speculation to say that another arbitrator would reach the same result in Werito's case. Moreover, contrary to our colleague's suggestion, it does not follow that application of the amended policy would have insulated Werito's discharge from arbitral challenge. If the Respondent had applied the amended policy, it would have been discharging Werito under a policy that was not known to Werito at the time of his discharge-triggering tardiness and the discharge would accordingly have been vulnerable to an ex post facto challenge at arbitration.

ORDER

The National Labor Relations Board orders that the Respondent, BHP (USA) Inc., d/b/a BHP Coal New Mexico, Farmington, New Mexico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the International Union of Operating Engineers, Local 953, AFL–CIO, as the duly designated representative of its employees in the appropriate bargaining unit by making unilateral changes to its General Rules of Conduct.

(b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[4] The Respondent did not call Michael Baca, Werito's supervisor, as a witness. The judge drew the adverse inference that, if called, Baca would have testified that the amended policy was a factor in the discharge decision. We find it unnecessary to decide whether the adverse inference was warranted. Assuming arguendo that it was, the evidence would still be insufficient to establish that the discharge was based on the amended attendance policy.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act.

(a) Upon the request of the Union, rescind the unilateral changes found herein.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All production and maintenance employees of the Navajo, San Juan and La Plata mines and other Company coal mining operations in the Four Corners Region, but excluding office clerical employees, guards and supervisors as defined in the Act.

(c) Within 14 days after service by the Region, post at its facilities in the "Four Corners Region" copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 13, 2001.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 10, 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER WALSH, dissenting in part.

I agree with my colleagues that the Respondent violated Section 8(a)(5) by unilaterally implementing changes to its 1995 attendance policy.[1] I would also affirm, however, the judge's finding that the Respondent violated Section 8(a)(5) by discharging Truby Werito for excessive tardiness on February 13, 2001,[2] pursuant to its unlawfully implemented attendance policy dated November 2000. The record fully supports this finding.

The Respondent excepts to the judge's finding on the basis that it discharged Werito pursuant to its 1995 attendance policy rather than the amended November 2000 policy. This argument does not withstand scrutiny.

The record reveals the following undisputed facts. Before the Respondent revised its 1995 attendance policy in November 2000, the policy did not reference tardiness as distinct from absenteeism. The Respondent argues that despite this fact, it treated unexcused tardiness the same as unexcused absenteeism under the 1995 attendance policy, even though the policy defined absenteeism as "not show[ing] up for an assigned shift." The 1995 attendance policy called for termination on having three unexcused absences during a 6-month period. Thus, under the Respondent's interpretation of the 1995 attendance policy, an employee would be subject to termination if he had three unexcused tardiness reports during a 6-month period.

Significantly, however, in 1999 an arbitrator found that the Respondent did not have just cause for terminating employee Todd Sloan for excessive tardiness because neither the language of the Respondent's 1995 attendance policy nor its past practice supported the termination. The arbitrator found that because the Respondent had inconsistently disciplined employees for excessive unexcused tardiness in the past, and the 1995 attendance policy did not explicitly reference tardiness, the Respondent did not have a clearly promulgated and enforced tardiness policy. Accordingly, the arbitrator found that the Respondent did not have a contractual basis to discharge Sloan for excessive unexcused tardiness.

The Respondent admits that, as a direct result of this arbitration decision, it revised the 1995 attendance policy in order to set forth a clear disciplinary formula for unexcused tardiness and thereby help to ensure consistent discipline by supervisors. The Respondent finalized the revisions and sent the General Rules of Conduct booklet

[1] I find that the judge correctly applied the clear and unmistakable waiver analysis under Board precedent in rejecting the Respondent's argument that the Union waived its right to bargain over the attendance policy by virtue of the management rights clause contained in the parties' collective-bargaining agreement.

[2] All dates hereinafter are 2001 unless otherwise indicated.

containing the amended policy to be printed in November 2000. James Mik, the Respondent's human resources manager, testified that even though the printing was completed by the end of December 2000, the Respondent did not communicate the amended policy to the Union at that time because the Respondent was engaged in contract negotiations with the Union and did not want to "roll out" the amended policy until the negotiations had concluded.

For the first time, the attendance policy included termination as possible discipline for excessive unexcused tardiness or combinations of unexcused absences and tardiness. Instead of treating an unexcused tardiness report the same as an unexcused absence, the amended policy treats three unexcused tardiness reports within 6 months the same as one unexcused absence and treats each subsequent tardiness report the same as an unexcused absence. As under the 1995 attendance policy, the third unexcused absence calls for termination. Thus, under the amended policy, having four unexcused tardiness reports and one unexcused absence within a 6-month period would lead to termination. Werito's attendance record exactly matched this requirement for termination. The Respondent decided to discharge Werito on February 13, the same day that it disseminated the amended policy to the Union and "rolled out" the policy to its employees.[3]

On this record, the Respondent's explanation that it decided to discharge Werito on February 13 under its old 1995 policy does not hold muster. If the Respondent had been following its purported practice under its 1995 attendance policy of treating unexcused tardiness reports the same as unexcused absences, Werito would have been discharged after his third unexcused tardiness report on January 26. Perhaps most significantly, by arguing that it discharged Werito under the 1995 policy, the Respondent is necessarily arguing that it disregarded the Sloan arbitration ruling that the 1995 policy did not provide a contractual basis to discharge an employee for excessive tardiness. At the same time, the Respondent admits that the Sloan arbitration ruling drove the Respondent to change its attendance policy. The Respondent cannot have it both ways. It defies logic that the Respondent discharged Werito under the 1995 policy, when it admits that it amended this policy to provide a clear contractual basis for discharge for excessive tardiness and that it disseminated the amended policy to its employees and the Union on the same day that it decided to discharge Werito. The Respondent would not waste its time applying the old 1995 policy only to have the discharge set aside by an arbitrator.

In sum, the record shows that: (1) the 1995 attendance policy did not reference tardiness, much less provide for discipline or termination for excessive unexcused tardiness; (2) after an arbitrator ruled that neither this policy nor the Respondent's practice supported the Respondent's termination of an employee for excessive tardiness, the Respondent revised the policy in November 2000 to provide a clear disciplinary scheme for unexcused tardiness; (3) Werito's attendance record was a perfect match to that required by the amended policy for termination; and (4) the Respondent discharged Werito on February 13, the same day that it disseminated the amended policy to the Union and its workforce. Under these circumstances, I agree with the judge that Mik's testimony that the concurrent timing of Werito's discharge and the dissemination of the amended policy was a mere "coincidence" is unpersuasive.[4] These compelling facts more than support the judge's finding that the General Counsel met his burden of establishing by a preponderance of the evidence that the amended policy was a factor in Werito's discharge. Thus, I would adopt the judge's finding that the Respondent's unlawfully implemented attendance policy was a factor in Werito's discharge, and therefore the discharge violates Section 8(a)(5). See *Great Western Produce, Inc.*, 299 NLRB 1004, 1005 (1990).

In reversing the judge's finding that the amended policy was a factor in Werito's discharge, my colleagues rely on the fact that the tardiness violation which gave rise to Werito's discharge occurred on February 9. They further find that "the amended policy had not come into existence" at the time of Werito's discharge. However, it is uncontested that the Respondent finalized the amended policy and sent it to print in November 2000 and that it disseminated the amended policy to the Union and its employees on February 13. Thus, the amended policy was conveniently in place on the same day that the Respondent made its decision to discharge Werito, who had been held out of service by the Respondent until that date.

My colleagues further rely on the fact that the Respondent issued a final warning letter to Werito on January 29. They characterize the fact that Werito's final warn-

[3] I also agree with the judge's adverse inference finding relating to the Respondent's failure to call Werito's supervisor, Michael Baca, as a witness. The Respondent called Mik, who had no involvement in the decision to terminate Werito, as its only witness. Under these circumstances, the judge properly drew an adverse inference that Baca would have acknowledged that the amended policy was a factor in his decision to terminate Werito.

[4] Similarly, I find Mik's self-serving testimony that the policy was not actually implemented until some unknown date after February 13 to be unpersuasive.

ing letter contained an order of suspension as "strong evidence" that the final warning and suspension were not issued pursuant to the amended policy. However, this observation means little given that there is no allegation that Werito's final warning and suspension were issued pursuant to the amended policy. The sole issue presented is whether the amended policy played a role in the Respondent's termination of Werito on February 13. Furthermore, as explained above, the amended policy was finalized by management and sent to print in November 2000. The Respondent admittedly delayed disseminating the amended policy until February 13 only because it wanted to conceal it from the Union during contract negotiations. Thus, when the Respondent issued the final warning letter and suspension on January 29, it knew that it would shortly have its finalized policy in place. As noted above, I agree with the judge that the Respondent's argument—that it was a mere coincidence that it decided to disseminate the amended policy and to discharge Werito on the same day—is wholly unpersuasive.

Strangely, at the same time that my colleagues reject the judge's finding that the amended policy was a factor in Werito's discharge, they also reject the Respondent's own defense that it discharged Werito pursuant to its 1995 policy. My colleagues initially find it "unnecessary to decide under what other policy, if any at all, the Respondent's disciplinary action was taken." Nevertheless, they go on to expressly find that "[s]ince neither the 1995 attendance policy nor the new amended policy provides for either a suspension or a final warning, *the Respondent was applying neither policy* when it discharged Werito." (Emphasis added.) My colleagues then assert that there were not "only two regimens, viz. the 1995 attendance policy and the amended policy." The only explanation they provide for this obscure reference to a third "regimen" is that "there was a substantial period (covering the Werito conduct and his discharge) when the 1995 attendance policy was not consistently enforced against tardiness violations and the amended policy had not come into existence." Thus, my colleagues seem to find, sua sponte, that the Respondent's inconsistent enforcement of its 1995 policy constituted a separate "regimen" which was in place at the time of Werito's discharge.

The Respondent did not argue or produce any evidence that a separate, third "regimen" existed. Despite my colleagues' transparent attempt to convert the Respondent's *inconsistent enforcement* of its 1995 attendance policy into a separate "regimen," it is uncontested that the only policy that was in place before the amended policy was finalized in November 2000 and "rolled out" on February 13 was the 1995 policy. The Respondent's inconsistent enforcement of that policy does not equate to a separate, independent "regimen" (whatever my colleagues may mean by that undefined term).

Moreover, as explained above, it was that very same inconsistent enforcement of the 1995 policy that led the Sloan arbitrator to find that *neither* the Respondent's *policy nor its past practice* supported the termination of an employee for excessive tardiness. The arbitrator set aside the Sloan discharge due to the absence of a *clearly promulgated and enforced* tardiness policy. My colleagues do not go so far as to posit the existence of a clearly promulgated and enforced tardiness policy, and in fact concede, as they must, that the Respondent promulgated its amended policy in response to the Sloan arbitrator's ruling. Again, it is far more reasonable to assume that the Respondent applied its amended policy, and that it would not waste its time and effort applying its former, inconsistently enforced policy, which would undoubtedly result in Werito's discharge being set aside by an arbitrator.

As explained above, the record facts provide more than ample support for the judge's finding that the General Counsel met his burden of proving by a preponderance of the evidence that the amended policy was a factor in the Respondent's decision to discharge Werito for excessive tardiness. My colleagues' finding to the contrary defies logic as well as the Respondent's own explanation for the discharge.

Dated, Washington, D.C. June 10, 2004

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with the Union as the duly designated representative of our employees by unilaterally changing and implementing changes in the General Rules of Conduct.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, upon request of the Union, rescind all unilateral changes to the attendance policy associated with the November 2000 General Rules of Conduct.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All production and maintenance employees of the Navajo, San Juan and La Plata mines and other Company coal mining operations in the Four Corners Region, but excluding office clerical employees, guards and supervisors as defined in the Act.

BHP (USA) INC. D/B/A/ BHP COAL NEW MEXICO

Joel C. Schochet, Esq., for the General Counsel.
Raymond M. Deeny and *Patrick R. Scully, Esqs.,* of Denver, Colorado, for the Respondent.
John L. Hollis, Esq., of Albuquerque, New Mexico, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Farmington, New Mexico, on April 2, 2002, on the General Counsel's consolidated complaint alleging that the Respondent unilaterally implemented a change in terms and conditions of employment, thus, violating Section 8(a)(5) of the National Labor Relations Act. It is also alleged that the Respondent unlawfully discharged employee Truby Werito pursuant to the unilateral change and therefore in violation of Section 8(a)(5).

The Respondent generally denied that it committed any violations of the Act and affirmatively contends the change in its General Rules of Conduct was not a mandatory subject of bargaining, that Werito was not discharged pursuant to the change, that the Union waived any right it may have had to bargain about the change, that this matter is barred by collateral estoppel, that it has been deferred to arbitration, and that in any event, Section 10(b) bars a remedial order.[1]

On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I hereby make the following findings of fact, conclusions of law, and recommended order.

I. JURISDICTION

The Respondent is a Delaware corporation with operations and facilities near Farmington, New Mexico, and is engaged in mining coal. In connection with its business, the Respondent annually purchases and receives goods, products, and materials valued in excess of $50,000 directly from points outside the State of New Mexico. I therefore conclude that the Respondent is an employer engaged in interstate commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Charging Party, International Union of Operating Engineers, Local 953, AFL–CIO (Union) is admitted to be, and I find is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

For many years, the Union and the Respondent have had a bargaining relationship covering a unit of production and maintenance employees at the Respondent's mines located in the "Four Corners Region." Their most recent collective-bargaining agreement is effective from February 1, 2001, through January 31, 2004.

In addition to the collective-bargaining agreements, since at least 1977 the Respondent has maintained written "General Rules of Conduct" which have been amended from time to time. Although the Respondent contends that the Union never has requested bargaining over these rules during contract negotiations, on March 1, 1993, the Union did request discussion about the then new rules. And the parties have negotiated certain aspects of the rules—specifically the details of implementing the "drug and alcohol policy."

As a matter of practice, according to the testimony of Human Resources Manager James Mik, when management determines to change the General Rules of Conduct, the amended rules are put in booklet form and then given to the Union and "rolled out" to the employees.

The earliest rules in evidence are dated December 1, 1992. In that incarnation, and all subsequent ones, including the most recent dated November 2000, is: "Violation of these rules will be cause for disciplinary action, including possible termination. . . . 16. Unexcused/ unreported absences or tardiness is prohibited (See Attendance Policy.)." In each booklet, following the 16 listed rules is the attendance policy which defines absences, how to report absences and progressive discipline for unexcused absences.

Until the November 2000 rules, tardiness was not referred to in the attendance policy following the 16 general rules, although rule 16 in all previous drafts did prohibit unexcused/unreported tardiness. And over the years many employees had been disciplined for excessive tardiness, including one discharge, which was reduced to a suspension without pay following an arbitration hearing.

[1] The Respondent further contends that Local 953 is not a proper party to the Complaint. However, the Respondent did not offer facts to support this assertion or suggest how, if true, it should affect the outcome of this proceeding.

In the November 2000 booklet, the rule on absences and tardiness is numbered 17. And in the following attendance policy, tardiness is specifically dealt with. The November 2000 rules state that three unexcused tardies within 6 months will equal one absence as will each subsequent tardy.

According to Mik, as a result of the 1999 Todd Sloan arbitration, the rules were amended to insure more consistency among supervisors in giving discipline for tardiness. Sloan had been discharged for excessive tardiness, and the arbitrator found that the Respondent had always taken the position that unexcused absences and unexcused tardiness carried the same penalty; however, he also found that this position "is not supported by the language of the Policy, or past practice." And he found that discipline for tardiness had been inconsistently enforced. He ordered Sloan reinstated, but without backpay.

Mik also testified that the new rules were not effective until sometime after February 13, 2001, even though the booklet had been dated November 2000 and distributed to supervisors before the end of the year. He testified the new rules were given to the Union on February 13, and then were in the process of being "rolled out" to employees. He contends the new rules were not effective until after this process had been completed.

According to the company documents, between September 17, 2000, and January 27, 2001, Werito had three unexcused tardies and one unexcused absence. Thus he was suspended and given a warning letter by Baca on January 31, which stated, among other things, that another unexcused absence or tardy would result in his termination. On February 9, Werito was again late for a "roll-out meeting" held prior to his regular shift. He was held out of service and on February 13 discharged.

According to Mik, when Werito was discharged "[i]t would have been under the October 1995 rules—the one preceding these." It was, he said, a mere coincidence that the Respondent notified the Union of the change in the rules on the same day it discharged Werito. However Mik's involvement, if any, in Werito's discharge was as a staff person. The supervisor who actually terminated Werito was safety and assistant maintenance superintendent, Michael Baca, and Baca was not called as a witness.[2] Since Baca was a member of management, and the individual who actually discharged Werito, I infer that he would have acknowledged that the new rules were a factor in his decision.

B. Analysis and Concluding Finding

The General Counsel alleges that the amended rules of November 2000 changed terms and conditions of employment and as they were implemented unilaterally, the Respondent thereby violated Section 8(a)(5) of the Act. Further, since Werito was discharged based on the tardiness formula set forth in the amended rules, this was also violative Section 8(a)(5).

1. The unilateral change

There is no question that the Respondent drafted and adopted the new rules without bargaining with the Union. There is also no question that the rules define certain terms and conditions of employment and therefore as a general principle would be a mandatory subject of bargaining. Nevertheless, the Respondent argues that there has never been bargaining over the General Rules of Conduct and that any disagreements are handled through the grievance and arbitration process.

Apparently the Respondent argues that the Union's conduct over the years in not demanding that the Respondent bargain about the rules of conduct during negotiations amounts to a waiver. I disagree. Notwithstanding that the Union may not have demanded negotiation in the past over the rules, such does not immunize the Respondent from bargaining about proposed changes it may want to make. Waiver of bargaining rights must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 fn. 12 (1983); *Mt. Sinai Hospital*, 331 NLRB 895 (2000). There is no evidence here of a clear and unmistakable waiver by the Union of its right to bargain over a matter which could reasonably affect the employment status of its members.

The Board has repeatedly rejected the waiver argument where a change in terms and conditions of employment has been presented as a fait accompli, notwithstanding that the bargaining representative had not requested bargaining over previous changes. *Roll & Hold Warehouse & Distribution Corp.*, 325 NLRB 41 (1997); *Johnson-Bateman Co.*, 295 NLRB 180 (1989), citing *NLRB v. Miller Brewing Co.*, 408 F.2d 12, 15 (9th Cir. 1969): "[I]t is not true that a right once waived under the Act is lost forever. . . . Each time the bargainable incident occurs—each time new rules are issued—(the) Union has the election of requesting negotiations or not. An opportunity once rejected does not result in a permanent 'close out.'"

As the Board said in *Bath Iron Works Corp.*, 302 NLRB 898, 901 (1991), "The mere fact that a union has previously acquiesced in an employer's unilateral implementation of plant rules does not mean, however, that the employer is free thereafter to implement different . . . rules or significant and material changes in existing plant rules without giving the union notice and an opportunity to bargain."

Thus the issue, I think, is whether there was a substantive change in the rules adopted in November 2000. I conclude there was. Unquestionably unexcused tardiness had always been prohibited under the rules and many employees had been disciplined for unexcused tardiness. However, as Mik testified, the discipline of employees for unexcused tardiness was inconsistent. Therefore the Respondent sought to define in unambiguous terms the progression of discipline for such tardiness.

In brief, the amended rules state that "three unexcused tardiness reports within a six month period will equal one unexcused absence and each additional unexcused tardy will be considered an unexcused absence." Further, combinations of unexcused absences and tardiness would result in disciplinary action, including termination. As before, the third unexcused absence would mean termination. Under the amended rules, combining absences with tardiness, one unexcused absence and four unexcused tardiness reports would mean termination.

I conclude that by defining the levels of discipline, including discharge, for specific combinations of unexcused absences and

[2] As counsel for the Respondent correctly note, failure to call a witness presumed to be favorably disposed to a party justifies an adverse inference on facts which that witness is likely to have knowledge. *Dino & Sons Realty Corp.*, 330 NLRB 680 (2000).

tardiness where none had existed was a substantive change in terms and conditions of employment and therefore a mandatory subject of bargaining. By unilaterally implementing the November 2000 rules the Respondent violated Section 8(a)(5) of the Act.

2. The discharge of Truby Werito

As counsel for the Union acknowledges, the most difficult issue in this matter is the discharge of Truby Werito. For starters, Werito had a poor attendance/tardiness record. Within the 6-month period prior to his discharge, Werito had three unexcused tardies (September 17 and December 10, 2000, and January 26, 2001) and one unexcused absence (January 27, 2001), for which he received written warnings and suspensions. He had been warned that another incident of tardiness would result in his discharge. On February 9 he was late again. He was held out of service and discharged on February 13.

Though the Respondent had in past rules prohibited unexcused tardiness, and Werito had been warned about the consequences of additional tardiness, the issue here is whether his discharge resulted from the unlawful change in the "General Rules of Conduct." Where a company unlawfully implements changes in working rules, it thereby undercuts the union's bargaining authority. It follows that discipline based on such changes likewise undercuts the union's authority. Therefore, the Board has ruled, "If the Respondent's unlawfully imposed rules or policies were a factor in the discipline or discharge, then the discipline or discharge violates Section 8(a)(5)." *Great Western Produce*, 299 NLRB 1004, 1005 (1990). However, where the new rules are not a factor in the discipline or discharge, then irrespective of the unlawful change, there has been no violation of Section 8(a)(5). *Brimar Corp.*, 334 NLRB 1035 (2001).

Although Mik testified that Werito was discharged pursuant to the 1995 rules, his opinion is not persuasive. It was Baca, not Mik, who discharged Werito and Baca did not testify. As noted above, I infer that if called as a witness, Baca would not have persuasively supported Mik. I infer that Baca would have acknowledged that the new tardiness formula was a factor in his decision.

From this adverse inference and the documentary evidence I conclude that in fact Werito was discharged pursuant to application of the new rules, which Baca and all other supervisors had (according to Mik) prior to January 2001.

While Werito might have been terminated under the old rules, and the Respondent may well have had cause to do so, it is more likely than not that the absent the new formula Werito would have not have been discharged. I conclude that the new rules led Baca to discharge Werito for what amounted to a fourth unexcused tardy along with one unexcused absence. I therefore conclude that application of the new rules was a factor in Werito's discharge and therefore the Respondent violated Section 8(a)(5).

3. The Respondent's other defenses

The Respondent argues that the arbitrator in the Sloan matter implicitly concluded that discharge for tardiness is just cause, notwithstanding that he also ruled that the rule requiring regular on time attendance was not equitably enforced. The Respondent thus argues that since the correctness of the rule proscribing tardiness has been litigated, and the Union was a party to that litigation, this action is barred by collateral estoppel.

While this doctrine might in some cases apply to proceedings before the Board, I conclude this is not one of them. The issue here concerns the unilateral change in terms and conditions of employment—a matter which was not before the arbitrator.

The Respondent alleged, but did not offer evidence or argue on brief, that this matter should be dismissed because "(t)he claims in the Complaint have been deferred to the grievance/arbitration procedure contained in the Agreement." I reject this contention.

The Regional Director did initially decline to issue a complaint in Case 28–CA–17103 deferring the Union's allegation of unlawful unilateral changes in the General Rules of Conduct to the parties' collective-bargaining agreement. However, as the grievance procedure unfolded, it became clear that the Respondent was not in fact willing to arbitrate the issue of whether it lawfully implemented changes in the rules. As counsel stated in his August 2, 2001 letter, "we fully intend to arbitrate the rule, but only as to its reasonableness and not as applied to any individual disciplinary matter." The reasonableness of a change in conditions of employment, however, is irrelevant to the issue of whether that change was unlawfully implemented. Since the Respondent has refused to arbitrate the basic issues in this matter, its claim of deferral cannot be sustained.

Citing *NLRB v. Dynatron/Bondo Corp.*, 176 F.3d 1310 (11th Cir. 1999), the Respondent contends that Section 10(b) bars this proceeding because its rule treating tardiness as an offense justifying discipline was known to the Union more than 6 months prior to the charge here being filed. I find *Dynatron/Bondo* inapposite on the facts. There the new rule prohibited employees from being 15 minutes late to their workstations as distinct from being 15 minutes late to clock in. The court found that the company began issuing discipline to employees for being late to their workstations more than 6 months prior to the charge.

Here there is no question that the Respondent had always disciplined employees for being tardy. The rule change was in the formula for treating tardiness as absenteeism. Though the rule change existed in booklet form from sometime in November 2000, there is no evidence that the Union knew of the proposed changes until notified on February 13, which was within the Section 10(b) period.

Nor, as asserted by the Respondent, was the Union notified about the proposed rule change during the 2000 negotiations. Indeed, the Respondent has repeatedly taken the position that it would not negotiate changes in the rules of conduct (though it in fact did with regard to the drugs and alcohol policy). I therefore reject the Section 10(b) defense.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I conclude that it should be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act, including offering

reinstatement to Truby Werito to his former job, or if that job no longer exists, to a substantially equivalent position of employment and make him whole for any loss of earnings and other benefits in accordance with the provisions, *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Although Section 10(c) proscribes any order by the Board which would require reinstatement or backpay where an individual is in fact discharged for cause, whether there was such cause here is open to question. Werito had a poor attendance/tardiness record, nevertheless his discharge was based on application of the new rules. I cannot conclude that the Respondent established that he would have been discharged absent the new rules. Accordingly, I conclude that a reinstatement and backpay order is permissible.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, BHP (USA) Coal Inc. d/b/a BHP Coal New Mexico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Union as the duly designated representative of its employees in the appropriate bargaining unit by unilaterally changing and implementing changes in the General Rules of Conduct.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act.

(a) Cease giving effect to the General Rules of Conduct dated November 2000 until such time as the Respondent has bargained with the Union. The appropriate bargaining unit is:

> All production and maintenance employees of the Navajo, San Juan and La Plata Mines and other Company coal mining Operations in the Four Corners Region, but excluding office Clerical employees, guards and supervisors as defined in the Act.

(b) Offer Truby Werito reinstatement and backpay in accordance with the remedy section above.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facilities in the "Four Corners Region" copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all former employees employed by the Respondent at any closed facility since the date of this Order.

(e) Within 21 days after service of this Order, inform the Region, in writing, what steps the Respondent has taken to comply therewith.

Dated San Francisco, California, June 12, 2002.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with the Union as the duly designated representative of our in employees by unilaterally changing and implementing changes in the General Rules of Conduct.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL bargain with the Union concerning changes in the General Rules of Conduct and will not enforce those dated November 2000 until we have done so.

WE WILL offer Truby Werito reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position of employment and make him whole for any loss of wages or other benefits he may have suffered.

BHP (USA) INC. D/B/A BHP COAL NEW MEXICO

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."